Supreme Court, U.S.
FILED
SEP 18 2000
CLERK

No. 99-1908

In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BILL PRYOR
Attorney General of Alabama

JOHN J. PARK, JR.*
**Counsel of Record*
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) 7

Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994) 8

Lau v. Nichols, 414 U.S. 563 (1974) 7, 8

Pennhurst State School v. Halderman, 451 U.S. 1 (1981) 7

FEDERAL STATUTES

20 U.S.C. § 1703(f) 8

42 U.S.C. § 1973aa-1a 9

OTHER AUTHORITIES

Civil Rights Division, United States Department of Justice, "Enforcement of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance," 65 Fed. Reg. 50123 (Aug. 16, 2000) ..... *passim*

Executive Order 13166, 65 Fed. Reg. 50121 (Aug. 16, 2000) ..... *passim*

SUPPLEMENTAL BRIEF

1. Petitioners James Alexander, in his official capacity as Director of the Alabama Department of Public Safety, and the Alabama Department of Public Safety (the "Department") submit this Supplemental Brief in support of their Petition for Writ of Certiorari for the purpose of bringing to this Court's attention new matter not in existence at the time Petitioners filed their Reply Brief. Specifically, after Petitioners filed their Reply Brief on August 9, 2000, President Clinton issued Executive Order 13166 on August 11, 2000. *See* Supp. App. at 10a-13a. In addition, on August 16, 2000, the Department of Justice ("DOJ") published Policy Guidance entitled "Enforcement of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons with Limited English Proficiency" in the Federal Register which is based on the opinion of the Court of Appeals in this case.[1] *See* Supp. App. at 14a-28a. These new matters relate directly to the issues raised in the Petition and make it even more timely as well as fitting for this Court to review the Eleventh Circuit's decision.

2. The President's Executive Order and DOJ's Policy Guidance highlight both the timeliness and certworthiness of this case. In Section 602 of the Civil Rights Act of 1964, Congress expressly made the federal agencies responsible for ensuring that their grantees followed agency regulations and provided those agencies with an enforcement mechanism. If an effective method for

---

[1] The Department of Justice Policy Guidance is effective August 11, 2000. Supp. App. at 14a.

agency policing of grantees is in place, there is no need for the judiciary to find an implied private right of action in Section 602. Executive Order 13166 and the DOJ Policy Guidance provide just such a mechanism directing the federal agencies to promulgate guidelines on dealing with persons with limited proficiency in English. While Petitioners believe that the Policy Guidance is flawed, that problem is only compounded exponentially by the Court of Appeals' decision to allow a private litigant to do what Congress authorized the federal agencies to do 25 years ago and what the President and DOJ are now telling them to do. If the Court of Appeals' decision in this case stands, the DOJ Policy Guidance will produce a flood of lawsuits against federal grantees.

3. This case arises under Title VI of the Civil Rights Act of 1964 and its implementing regulations. Respondent contends that the Alabama Department of Public Safety's practice of giving the written examinations for driver's licenses in only the English language has the effect of discriminating on the basis of national origin. The Court of Appeals held that Respondent, a private individual, can sue the Department, a federal grantee, to enforce agency regulations. In addition, the Court of Appeals held that language could be equated to national origin, thereby providing the basis for the federal courts' directive to the Department to change its English-only policy.

Executive Order 13166 and the DOJ Policy Guidance bear directly on the relief ordered in this case and, through that relief, on the importance of the claimed private right of action. In Executive Order 13166, President Clinton directs federal agencies to "work to ensure

that recipients of federal financial assistance (recipients) provide meaningful access to their [Limited English Proficient] applicants and beneficiaries." Supp. App. at 11a (parenthesis in original; brackets added). President Clinton then interlocks Executive Order 13166 with the DOJ Policy Guidance, stating:

> To assist the agencies . . . , the Department of Justice has today issued a general guidance document (LEP Guidance), which sets forth the compliance standards that recipients must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI of the Civil Rights Act of 1964, as amended, and its implementing regulations.

Supp. App. at 11a (parenthesis in original). Finally, President Clinton states:

> This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.

Supp. App. at 13a.

In the DOJ Policy Guidance, which is in the form of a Memorandum from Bill Lann Lee, Assistant Attorney General, Civil Rights Division to Executive Agency Civil Rights Officers, DOJ advises the agencies that "Title VI and its regulations require recipients to take reasonable steps to ensure 'meaningful' access to the information and services they provide." Supp. App. at 23a. Grantees

will have to take some *affirmative* step[2] in favor of each person with limited English proficiency ("LEP person") because DOJ states, "Recipients who fail to provide services to LEP applicants and beneficiaries in their federally assisted programs and activities may be discriminating on the basis of national origin in violation of Title VI and its implementing regulations." *Id.* DOJ states that what steps are reasonable depends in part on the "number or proportion of LEP persons in the eligible service population." *Id.* DOJ then explains:

> The steps that are reasonable for a recipient who serves one LEP person a year may be different than those expected from a recipient that serves several LEP persons each day. But even those who serve very few LEP persons on an infrequent basis should utilize this balancing analysis to determine whether reasonable steps are possible. . . .

Supp. App. at 23a-24a. Finally, DOJ states, "It is the responsibility of federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments by applying their program expertise to concrete cases." Supp. App. at 27a.

---

[2] DOJ states that recipients who serve "very few LEP persons on an infrequent basis" should have a "plan," adding that the "plan need not be intricate; it may be as simple as being prepared to use one of the commercially available language lines to obtain immediate interpreter service." Supp. App. at 24a; *see also* Supp. App. at 26a, n.13 carryover ("[I]n situations where all of the factors identified in the text are at their nadir, it may be 'reasonable' to take no affirmative steps to provide further access.") Thus, grantees will have to bear the expense of using "one of the commercially available language lines."

4. In their Petition, Alexander and the Department raise the question whether Congress intended to create a private right of action against a State agency that receives federal grant funds. If such a private right of action exists, private individuals can sue grantees directly to enforce agency regulations, thereby bypassing the agency review and enforcement procedures that Congress established and which the President and DOJ have recently addressed.

Executive Order 13166 and the DOJ Policy Guidance illustrate how Congress intended Title VI to be enforced. These directives also show that the federal agencies will be dealing with the underlying issue in this case, thereby calling into question the need for a private right of action. Executive Order 13166 directs federal agencies to "draft title VI guidance specifically tailored to its recipients that is consistent with the LEP Guidance issued by the Department of Justice. This agency-specific guidance shall detail how the general standards established in the LEP Guidance will be applied to the agency's recipients." Supp. App. at 12a. The DOJ Policy Guidance declares, "It is the responsibility of federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments [than the general guidance] by applying their program expertise to concrete cases." Supp. App. at 27a. When the agencies have complied with these instructions, they will have a basis for any necessary enforcement activity and can then report to Congress as Section 602 requires.

In this case, conversely, no federal grantor agency has initiated enforcement action against the Department

because of its English-only testing policy, much less provided notice to Congress. Thus, while the Administration is telling federal agencies to prepare the basis for compliance with Section 602, the Court of Appeals has allowed a private individual to tell the Department, a State agency, what to do.

Further, the forthcoming agency-level policy guidance portends only more language-related litigation against Title VI grantees unless certiorari is granted and the Court of Appeals' decision is reversed. DOJ's Policy Guidance sets forth imprecise criteria that may cover as few as one person of limited English proficiency who speaks one of any of the languages spoken on Earth.[3] It states:

> What constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors. Among the factors to be considered are the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come into contact with the program, the importance of the service provided by the program and the resources available to the recipient.

Supp. App. at 23a. The result is a "balancing analysis" that must be employed for every LEP person because

---

[3] DOJ states that its Policy Guidance "does not create new obligations, but rather, clarifies existing Title VI responsibilities." Supp. App. at 14a, 15a-16a. Alexander and the Department disagree because the Policy Guidance directs agencies to impose an affirmative obligation of accommodation that is greater than the congressionally mandated Title VI obligation to refrain from intentional discrimination.

"[p]rograms that serve a few or even one LEP person are still subject to the Title VI obligation to take reasonable steps to provide meaningful opportunities for access." *Id.* In the eye of the Policy Guidance, every language must be accommodated because there is no principled basis for selecting some languages but not others. There is also no way for a grantee to predict what steps will be found by a court after the fact to be "reasonable" and to make for a "meaningful opportunit[y]." *Cf. Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981) ("There can be no knowing acceptance if a State is . . . unable to ascertain what is expected of it.").

The Policy Guidance is promulgated in an attempt to stamp out discrimination on the basis of national origin, but this Court has concluded that national origin is one's country of origin or the country of origin of one's ancestors. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-89 (1973). In addition, because the Policy Guidance rests on a broad interpretation of this Court's ruling in *Lau v. Nichols*, 414 U.S. 563 (1974), it highlights the need to cabin *Lau*. *See* Pet. at 17; Brief of U.S. English as Amicus Curiae in Support of Petition for Writ of Certiorari at 11-13, *Alexander v. Sandoval* (No. 99-1908). While the Policy Guidance applies to programs that serve "a few or even one LEP person," Justice Blackmun, joined by Chief Justice Burger, warned against interpreting *Lau* "too broadly." *Lau*, 414 U.S. at 572 (Blackmun, J., joined by Burger, C. J., concurring in the result). He explained:

> I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children

> cannot understand the language of the classroom. . . . [W]hen, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish, or any other language other than English, I would not regard today's decision, or the separate concurrence as conclusive. . . .

Id. If, as the Policy Guidance provides, the size of a foreign-language speaking population is irrelevant, the limitation Justices Blackmun and Chief Justice Burger had in mind for obligations and lawsuits is likewise to be discarded.[4]

Instead of limiting *Lau*, the Policy Guidance expands its reach, relying in part on the Court of Appeals' decision in this case. Specifically, the Policy Guidance states:

> Courts have applied the doctrine enunciated in *Lau* both inside and outside the education context. It has been considered in contexts as varied as what languages drivers' license tests must be given in or whether material relating to unemployment benefits must be given in a language other than English.

Supp. App. at 19a (citing the decision below as an example of "cases outside the educational context"). This expansion of *Lau's* scope contrasts with the view of Congress, which codified *Lau* in the education context, *see* 20

---

[4] Insofar as the Policy Guidance shifts the burden of justification to grantees, it conflicts with the Ninth Circuit's decision in *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) (rejecting EEOC's "English-only rule Guidelines," 29 C.F.R. 1606.7(a) (1991) as beyond the agency's authority).

U.S.C. § 1703(f), and has imposed an obligation to speak in foreign languages in only one other context, voting, *see, e.g.*, 42 U.S.C. § 1973aa-1a (bilingual ballots). Moreover, this expansion threatens to ripple through to Title VII because that Title also proscribes discrimination on the basis of "national origin."

In sum, the combination of a private right of action and overbroad federal regulations promise a flood of litigation against federal grantees. Private litigants will use the courts to tell grantees to do something that neither the Constitution nor federal statutes mandate. Furthermore, a private right of action bypasses the agency enforcement mechanism that Congress expressly established. At one level, Executive Order 13166 and the DOJ Policy Guidance finally tell the agencies to provide guidance to their grantees in a way that might allow for agency enforcement in accordance with Section 602. If a private right of action is enshrined in law, however, the Policy Guidance provides only a basis for lawsuits, with the concomitant risk that the judiciary will expand Title VI outside the congressionally established framework.

In the view of Alexander and the Department, the Petition raised a fundamental question of federal law worthy of consideration by this Court. Executive Order

13166 and the DOJ Policy Guidance make such consideration all the more imperative.

Respectfully submitted,

BILL PRYOR
Attorney General of Alabama

JOHN J. PARK, JR.
Assistant Attorney General

Office of the Attorney General
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

Counsel for Petitioners

Federal Register **Presidential Documents**

Vol. 65, No. 159

Wednesday, August 16, 2000

Title 3 –

Executive Order 13166 of August 11, 2000

The President

Improving Access to Services for Persons With Limited English Proficiency

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency (LEP), it is hereby ordered as follows:

Section 1. *Goals.*

The Federal Government provides and funds an array of services that can be made accessible to otherwise eligible persons who are not proficient in the English language. The Federal Government is committed to improving the accessibility of these services to eligible LEP persons, a goal that reinforces its equally important commitment to promoting programs and activities designed to help individuals learn English. To this end, each Federal agency shall examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental

mission of the agency. Each Federal agency shall also work to ensure that recipients of Federal financial assistance (recipients) provide meaningful access to their LEP applicants and beneficiaries. To assist the agencies with this endeavor, the Department of Justice has today issued a general guidance document (LEP Guidance), which sets forth the compliance standards that recipients must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI of the Civil Rights Act of 1964, as amended, and its implementing regulations. As described in the LEP Guidance, recipients must take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.

Sec. 2. *Federally Conducted Programs and Activities.*

Each Federal agency shall prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons. Each plan shall be consistent with the standards set forth in the LEP Guidance, and shall include the steps the agency will take to ensure that eligible LEP persons can meaningfully access the agency's programs and activities. Agencies shall develop and begin to implement these plans within 120 days of the date of this order, and shall send copies of their plans to the Department of Justice, which shall serve as the central repository of the agencies' plans.

Sec. 3. *Federally Assisted Programs and Activities.*

Each agency providing Federal financial assistance shall draft title VI guidance specifically tailored to its recipients that is consistent with the LEP Guidance issued by the Department of Justice. This agency-specific guidance shall detail how the general standards established in the LEP Guidance will be applied to the agency's recipients. The agency-specific guidance shall take into account the types of services provided by the recipients, the individuals served by the recipients, and other factors set out in the LEP Guidance. Agencies that already have developed title VI guidance that the Department of Justice determines is consistent with the LEP Guidance shall examine their existing guidance, as well as their programs and activities, to determine if additional guidance is necessary to comply with this order. The Department of Justice shall consult with the agencies in creating their guidance and, within 120 days of the date of this order, each agency shall submit its specific guidance to the Department of Justice for review and approval. Following approval by the Department of Justice, each agency shall publish its guidance document in the **Federal Register** for public comment.

Sec. 4. *Consultations.*

In carrying out this order, agencies shall ensure that stakeholders, such as LEP persons and their representative organizations, recipients, and other appropriate individuals or entities, have an adequate opportunity to provide input. Agencies will evaluate the particular needs of the LEP persons they and their recipients serve

and the burdens of compliance on the agency and its recipients. This input from stakeholders will assist the agencies in developing an approach to ensuring meaningful access by LEP persons that is practical and effective, fiscally responsible, responsive to the particular circumstances of each agency, and can be readily implemented.

Sec. 5. *Judicial Review.*

This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.

/s/ William J. Clinton

THE WHITE HOUSE,
August 11, 2000.

Federal Register/Vol. 65, No. 159/Wednesday, August 16, 2000/Notices

DEPARTMENT OF JUSTICE

Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance

AGENCY: Civil Rights Division, Department of Justice.

ACTION: Policy guidance document.

SUMMARY: This Policy Guidance Document entitled "Enforcement of Title VI of the Civil Rights Act of 1964 "National Origin Discrimination Against Persons with Limited English Proficiency (LEP Guidance)" is being issued pursuant to authority granted by Executive Order 12250 and Department of Justice Regulations. It addresses the application of Title VI's prohibition on national origin discrimination when information is provided only in English to persons with limited English proficiency. This policy guidance does not create new obligations, but rather, clarifies existing Title VI responsibilities. The purpose of this document is to set forth general principles for agencies to apply in developing guidelines for services to individuals with limited English proficiency. The Policy Guidance Document appears below.

DATES: Effective August 11, 2000.

ADDRESSES: Coordination and Review Section, Civil Rights Division, P.O. Box 66560, Washington, D.C. 20035-6560.

FOR FURTHER INFORMATION CONTACT: Merrily Friedlander, Chief, Coordination and Review Section, Civil Rights Division, (202) 307-2222.

Helen L. Norton,
Counsel to the Assistant Attorney General, Civil Rights Division.

Office of the Assistant Attorney General

Washington, D.C. 20530

August 11, 2000.

TO: Executive Agency Civil Rights Officers

FROM: Bill Lann Lee, Assistant Attorney General, Civil Rights Division

SUBJECT: Policy Guidance Document: *Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons With Limited English Proficiency* ("LEP Guidance")

This policy directive concerning the enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq., as amended,* is being issued pursuant to the authority granted by Executive Order No. 12250[1] and Department of Justice regulations.[2] It addresses the application to recipients of federal financial assistance of Title VI's prohibition on national origin discrimination when information is provided only in English to persons who do not understand English. This policy guidance does not create

[1] 42 U.S.C. § 2000d-1 note.

[2] 28 C.F.R. § 0.51.

new obligations but, rather, clarifies existing Title VI responsibilities.

Department of Justice Regulations for the Coordination of Enforcement of Non-discrimination in Federally Assisted Programs (Coordination Regulations), 28 C.F.R. 42.401 *et seq.*, direct agencies to "publish title VI guidelines for each type of program to which they extend financial assistance, where such guidelines would be appropriate to provide detailed information on the requirements of Title VI." 28 CFR § 42.404(a). The purpose of this document is to set forth general principles for agencies to apply in developing such guidelines for services to individuals with limited English proficiency (LEP). It is expected that, in developing this guidance for their federally assisted programs, agencies will apply these general principles, taking into account the unique nature of the programs to which they provide federal financial assistance.

A federal aid recipient's failure to assure that people who are not proficient in English can effectively participate in and benefit from programs and activities may constitute national origin discrimination prohibited by Title VI. In order to assist agencies that grant federal financial assistance in ensuring that recipients of federal financial assistance are complying with their responsibilities, this policy directive addresses the appropriate compliance standards. Agencies should utilize the standards set forth in this Policy Guidance Document to develop specific criteria applicable to review the programs and activities for which they offer financial

assistance. The Department of Education[3] already has established policies, and the Department of Health and Human Services (HHS)[4] has been developing guidance in a manner consistent with Title VI and this Document, that applies to their specific programs receiving federal financial assistance.

Background

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating against or otherwise excluding individuals on the basis of race, color, or national origin in any of their activities. Section 601 of Title VI, 42 U.S.C. § 2000d, provides:

---

[3] Department of Education policies regarding the Title VI responsibilities of public school districts with respect to LEP children and their parents are reflected in three Office for Civil Rights policy documents: (1) the May 1970 memorandum to school districts, "Identification of Discrimination and Denial of Services on the Basis of National Origin," (2) the December 3, 1985, guidance document, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures," and (3) the September 1991 memorandum, "Policy Update on Schools Obligations Toward National Origin Minority Students with Limited English Proficiency." These documents can be found at the Department of Education website at www.ed.gov/office/OCR.

[4] The Department of Health and Human Services is issuing policy guidance titled: "Title VI Prohibition Against National Origin Discrimination As It Affects Persons With Limited English Proficiency." This policy addresses the Title VI responsibilities of HHS recipients to individuals with limited English proficiency.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The term "program or activity" is broadly defined. 42 U.S.C. § 2000d-4a.

Consistent with the model Title VI regulations drafted by a Presidential task force in 1964, virtually every executive agency that grants federal financial assistance has promulgated regulations to implement Title VI. These regulations prohibit recipients from "restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program" and "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."

In *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court interpreted these provisions as requiring that a federal financial recipient take steps to ensure that language barriers did not exclude LEP persons from effective participation in its benefits and services. *Lau* involved a group of students of Chinese origin who did not speak English to whom the recipient provided the same services – an education provided solely in English – that it provided students who did speak English. The Court held that, under these circumstances, the school's

practice violated the Title VI prohibition against discrimination on the basis of national origin. The Court observed that "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program – all earmarks of the discrimination banned by" the Title VI regulations.[5] Courts have applied the doctrine enunciated in *Lau* both inside and outside the education context. It has been considered in contexts as varied as what languages drivers' license tests must be given in or whether material relating to unemployment benefits must be given in a language other than English.[6]

---

[5] 414 U.S. at 568. Congress manifested its approval of the *Lau* decision requirements concerning the provision of meaningful education services by enacting provisions in the Education Amendments of 1974, Pub. L. No. 93-380, §§ 105, 204, 88 Stat. 503-512, 515 codified at 20 U.S.C. 1703(f), and the Bilingual Education Act, 20 U.S.C. 7401 *et seq.*, which provided federal financial assistance to school districts in providing language services.

[6] For cases outside the educational context, *see, e.g., Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998), *affirmed*, 197 F.3d 484, (11th Cir. 1999), *rehearing and suggestion for rehearing en banc denied*, 211 F.3d 133 (11th Cir. Feb. 29, 2000) (Table, No. 98-6598-II), *petition for certiorari filed* May 30, 2000 (No. 99-1908) (giving drivers' license tests only in English violates Title VI); and *Pabon v. Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976) (summary judgment for defendants denied in case alleging failure to provide unemployment insurance information in Spanish violated Title VI).

Link Between National Origin And Language

For the majority of people living in the United States, English is their native language or they have acquired proficiency in English. They are able to participate fully in federally assisted programs and activities even if written and oral communications are exclusively in the English language.

The same cannot be said for the remaining minority who have limited English proficiency. This group includes persons born in other countries, some children of immigrants born in the United States, and other non-English or limited English proficient persons born in the United States, including some Native Americans. Despite efforts to learn and master English, their English language proficiency may be limited for some time.[7] Unless grant recipients take steps to respond to this difficulty, recipients effectively may deny those who do not speak, read, or understand English access to the benefits and services for which they qualify.

Many recipients of federal financial assistance recognize that the failure to provide language assistance to such persons may deny them vital access to services and benefits. In some instances, a recipient's failure to remove language barriers is attributable to ignorance of the fact

---

[7] Certainly it is important to achieve English language proficiency in order to fully participate at every level in American society. As we understand the Supreme Court's interpretation of Title VI's prohibition of national origin discrimination, it does not in any way disparage use of the English language.

that some members of the community are unable to communicate in English, to a general resistance to change, or to a lack of awareness of the obligation to address this obstacle.

In some cases, however, the failure to address language barriers may not be simply an oversight, but rather may be attributable, at least in part, to invidious discrimination on the basis of national origin and race. While there is not always a direct relationship between an individual's language and national origin, often language does serve as an identifier of national origin.[8] The same sort of prejudice and xenophobia that may be at the root of discrimination against persons from other nations may be triggered when a person speaks a language other than English.

> Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility * * * . It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.[9]

---

[8] As the Supreme Court observed, "[l]anguage permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond." *Hernandez v. New York*, 500 U.S. 352, 370 (1991) (plurality opinion).

[9] *Id.* at 371 (plurality opinion).

While Title VI itself prohibits only intentional discrimination on the basis of national origin,[10] the Supreme Court has consistently upheld agency regulations prohibiting unjustified discriminatory effects.[11] The Department of Justice has consistently adhered to the view that the significant discriminatory effects that the failure to provide language assistance has on the basis of national origin, places the treatment of LEP individuals comfortably within the ambit of Title VI and agencies' implementing regulations.[12] Also, existing language barriers potentially may be rooted in invidious discrimination. The Supreme Court in *Lau* concluded that a recipient's failure to take affirmative steps to provide "meaningful opportunity" for LEP individuals to participate in its

---

[10] *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

[11] *Id.* at 293-294; *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 n.2 (1983) (White, J.), 623 n.15 (Marshall, J.), 642-645 (Stevens, Brennan, Blackmun, JJ.); *Lau v. Nichols*, 414 U.S. at 568; *id.* at 571 (Stewart, J., concurring in result). In a July 24, 1994, memorandum to Heads of Departments and Agencies that Provide Federal Financial Assistance concerning "Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964," the Attorney General stated that each agency "should ensure that the disparate impact provisions of your regulations are fully utilized so that all persons may enjoy equally the benefits of federally financed programs."

[12] The Department's position with regard to written language assistance is articulated in 28 CFR § 42.405(d)(1), which is contained in the Coordination Regulations, 28 CFR Subpt. F, issued in 1976. These Regulations "govern the respective obligations of Federal agencies regarding enforcement of title VI." 28 CFR § 42.405. Section 42.405(d)(1) addresses the prohibitions cited by the Supreme Court in *Lau*.

programs and activities violates the recipient's obligations under Title VI and its regulations.

All Recipients Must Take Reasonable Steps To Provide Meaningful Access

Recipients who fail to provide services to LEP applicants and beneficiaries in their federally assisted programs and activities may be discriminating on the basis of national origin in violation of Title VI and its implementing regulations. Title VI and its regulations require recipients to take reasonable steps to ensure "meaningful" access to the information and services they provide. What constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors. Among the factors to be considered are the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come in contact with the program, the importance of the service provided by the program, and the resources available to the recipient.

(1) Number or Proportion of LEP Individuals

Programs that serve a few or even one LEP person are still subject to the Title VI obligation to take reasonable steps to provide meaningful opportunities for access. However, a factor in determining the reasonableness of a recipient's efforts is the number or proportion of people who will be excluded from the benefits or services absent efforts to remove language barriers. The steps that are reasonable for a recipient who serves one LEP person a-

year may be different than those expected from a recipient that serves several LEP persons each day. But even those who serve very few LEP persons on an infrequent basis should utilize this balancing analysis to determine whether reasonable steps are possible and if so, have a plan of what to do if a LEP individual seeks service under the program in question. This plan need not be intricate; it may be as simple as being prepared to use one of the commercially available language lines to obtain immediate interpreter services.

(2) Frequency of Contact with the Program

Frequency of contacts between the program or activity and LEP individuals is another factor to be weighed. For example, if LEP individuals must access the recipient's program or activity on a daily basis, e.g., as they must in attending elementary or secondary school, a recipient has greater duties than if such contact is unpredictable or infrequent. Recipients should take into account local or regional conditions when determining frequency of contact with the program, and should have the flexibility to tailor their services to those needs.

(3) Nature and Importance of the Program

The importance of the recipient's program to beneficiaries will affect the determination of what reasonable steps are required. More affirmative steps must be taken in programs where the denial or delay of access may have life or death implications than in programs that are not as crucial to one's day-to-day existence. For example, the obligations of a federally assisted school or hospital differ

from those of a federally assisted zoo or theater. In assessing the effect on individuals of failure to provide language services, recipients must consider the importance of the benefit to individuals both immediately and in the long-term. A decision by a federal, state, or local entity to make an activity compulsory, such as elementary and secondary school attendance or medical inoculations, serves as strong evidence of the program's importance.

(4) Resources Available

The resources available to a recipient of federal assistance may have an impact on the nature of the steps that recipients must take. For example, a small recipient with limited resources may not have to take the same steps as a larger recipient to provide LEP assistance in programs that have a limited number of eligible LEP individuals, where contact is infrequent, where the total cost of providing language services is relatively high, and/or where the program is not crucial to an individual's day-to-day existence. Claims of limited resources from large entities will need to be well-substantiated.[13]

---

[13] Title VI does not require recipients to remove language barriers when English is an essential aspect of the program (such as providing civil service examinations in English when the job requires person to communicate in English, *see Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975)), or there is another "substantial legitimate justification for the challenged practice." *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993). Similar balancing tests are used in other nondiscrimination provisions that are concerned with effects of an entity's actions. For example, under Title VII of the Civil Rights Act of 1964, employers need not cease practices that have a discriminatory effect if they are "consistent with business necessity" and there is no "alternative employment practice" that is equally effective. 42 U.S.C. § 2000e-2(k). Under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, recipients do not need to provide access to persons with disabilities if such steps impose an undue burden on the recipient. *Alexander v. Choate*, 469 U.S. at 300. Thus, in situations where all of the factors identified in the text are at their nadir, it may be "reasonable" to take no affirmative steps to provide further access.

Written vs. Oral Language Services

In balancing the factors discussed above to determine what reasonable steps must be taken by recipients to provide meaningful access to each LEP individual, agencies should particularly address the appropriate mix of written and oral language assistance. Which documents must be translated, when oral translation is necessary, and whether such services must be immediately available will depend upon the factors previously mentioned.[14] Recipients often communicate with the public in writing, either on paper or over the Internet, and written translations are a highly effective way of communicating with large numbers of people who do not speak, read or understand English. While the Department of Justice's

---

[14] Under the four-part analysis, for instance, Title VI would not require recipients to translate documents requested under a state equivalent of the Freedom of Information Act or Privacy Act, or to translate all state statutes or notices of rulemaking made generally available to the public. The focus of the analysis is the nature of the information being communicated, the intended or expected audience, and the cost of providing translations. In virtually all instances, one or more of these criteria would lead to the conclusion that recipients need not translate these types of documents.

Coordination Regulation, 28 CFR § 42.405(d)(1), expressly addresses requirements for provision of written language assistance, a recipient's obligation to provide meaningful opportunity is not limited to written translations. Oral communication between recipients and beneficiaries often is a necessary part of the exchange of information. Thus, a recipient that limits its language assistance to the provision of written materials may not be allowing LEP persons "effectively to be informed of or to participate in the program" in the same manner as persons who speak English.

In some cases, "meaningful opportunity" to benefit from the program requires the recipient to take steps to assure that translation services are promptly available. In some circumstances, instead of translating all of its written materials, a recipient may meet its obligation by making available oral assistance, or by commissioning written translations on reasonable request. It is the responsibility of federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments by applying their program expertise to concrete cases.

Conclusion

This document provides a general framework by which agencies can determine when LEP assistance is required in their federally assisted programs and activities and what the nature of that assistance should be. We expect agencies to implement this document by issuing guidance documents specific to their own recipients as contemplated by the Department of Justice Coordination

Regulations and as HHS and the Department of Education already have done. The Coordination and Review Section is available to assist you in preparing your agency-specific guidance. In addition, agencies should provide technical assistance to their recipients concerning the provision of appropriate LEP services.

[FR Doc. 00-20867 Filed 8-15-00; 8:45 am]